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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CHRISTINA MCCLELLAN,

Case No. 07-CV-1309-AA

Plaintiff,

v.

I-FLOW CORPORATION, a Delaware corporation; DJO, L.L.C., a Delaware corporation; and DJO INCORPORATED, a Delaware corporation, and PACIFIC MEDICAL, INC., a California corporation,

PLAINTIFFS' RESPONSE TO DEFENDANT STRYKER CORPORATION'S REQUEST FOR EMERGENCY REVIEW OF OBJECTIONS TO SUBPOENA FOR EXPERT MATERIALS PRIOR TO DEPOSITION

Defendants.

GORDON J. ADDIS,

Case No. 07-CV-1318-AA

Plaintiff,

v.

MCKINLEY MEDICAL, L.L.C., a Colorado corporation; MOOG, INC., a New York corporation; DJO INCORPORATED, a Delaware corporation; DJO, L.L.C., a Delaware corporation; PACIFIC MEDICAL, INC., a California corporation, CURLIN MEDICAL, L.L.C., a California corporation, and CURLIN MEDICAL, INC., a Delaware corporation,

Defendants.

Plaintiffs respond to the August 31, 2009 Request For Emergency Review Of Objections To Subpoena For Expert Materials Prior To Deposition by defendant Stryker Corporation as follows:

PLAINTIFFS' RESPONSE

Plaintiffs understand and are fully complying with the court's direction that plaintiffs shall produce all data considered by their designated expert witnesses on the issue of causation. Specifically, plaintiffs are working diligently to produce as quickly as possible the underlying data considered by Frederick Matsen, M.D. in forming his causation opinions proffered in these pain pump cases.

Previously the court directed production of redacted patient records of Charles Beck, M.D., another of plaintiffs' general causation expert witnesses. Dr. Beck's patient records had not previously been produced to defendants.¹

Stryker's instant motion concerns Frederick Matsen, M.D., another of plaintiffs' designated expert witnesses on causation. Dr. Matsen is in a different position than Dr. Beck. Dr. Matsen's opinion is based upon redacted patient records of 396 consecutive arthroscopic shoulder surgeries by a single physician. Stryker and the defendants are already in possession of ALL of the same redacted patient records Dr. Matsen has. Stryker has been in possession of all of those patient records for over six months. Unlike the situation with Dr. Beck, the defendants can conduct their own analysis, with the help of their chosen experts, of those patient records for the purpose of challenging Dr. Matsen's opinions and conclusions.

¹At the status conference on September 1, 2009, Judge Aiken ordered the defendants to bear the cost of copying, redacting, and producing copies of the redacted patient records and films of Dr. Beck's patients. Dr. Beck is ready to begin a rolling production of those records and films once Stryker selects and identifies a qualified vendor to perform the copying, redaction, and production of the records and films.

Plaintiffs also have produced the graphs and charts prepared by Dr. Matsen to illustrate his opinions and conclusions which were received into evidence at the trial of Grossnickle, et al v. Stryker Corporation, et al where Dr. Matsen testified about and was fully cross-examined by counsel for Stryker regarding the very same opinions and conclusions he proffers in these cases.² And plaintiffs have also produced copies of Dr. Matsen's documents relating to chondrolysis which are already in the public domain, including a manuscript regarding 67 patients with glenohumeral chondrolysis, even if they have not been considered by him for purposes of forming his opinions on causation.³

And in addition, plaintiffs are producing today additional data regarding the 396 consecutive patient study, including an updated spreadsheet containing analysis of the University of Washington of the patient records **and patient questionnaires**. These documents are all being produced subject to the terms of the Stipulated Protective Orders in these cases since they are confidential and proprietary records and data of the University of Washington relating to ongoing and incomplete academic research, as ordered by Judge Aiken.

Dr. Matsen's opinions proffered in these cases, that: (a) intraarticular use of pain pumps in the glenohumeral joint can cause chondrolysis; and (b) plaintiffs' McClellan's and Addis' chondrolysis were caused by intraarticular use of a pain pump in their glenohumeral joints, is in part based upon his study of 396 consecutive arthroscopic surgeries in the glenohumeral joint by a single orthopedic surgeon over 12 years, as set

²Grossnickle Exhibits 855, 856, 919, and 3340 have been produced.

³Grossnickle Exhibit 917 also has been produced, as has a more recent article on the University of Washington website. Plaintiffs are producing documents previously produced to Stryker during the course of the Grossnickle trial, pursuant to the Order of Judge Aiken at the status conference on September 1, 2009.

forth in his expert report. Defendants have all of the same patient records that Dr. Matsen has for all of those patients and are fully capable of conducting their own analysis and study to find any flaws in Dr. Matsen's consideration of those records. His opinions are also substantially based upon the published medical literature to which the defendants also have full access.

That portion of his expert reports entitled "The Study Of 67 Cases Of Glenohumeral Chondrolysis From Various Surgeons" is hereby withdrawn by Dr. Matsen to avoid any confusion or misunderstanding. Dr. Matsen will not make any mention of those 67 patients on his direct examination at the trial of this case because he did not consider any data relating to those patients in forming his opinions in this case. Nonetheless, plaintiffs have produced to defendants the same redacted records regarding the 67 patients referred to in this section of Dr. Matsen's expert reports so that the defendants have the very same underlying data which Dr. Matsen has.

Since the documents sought in Stryker's Subpoena, categories 14, 15, 21, and 22 relate to data Dr. Matsen is not considering and has not considered for purposes of forming his opinions on causation in these cases, it is plaintiffs' understanding that those documents need not be produced. See, Declaration Of Frederick A. Matsen, III, M.D. Regarding Stryker's Subpoena Dated July 23, 2009, paragraph 15. Moreover, the burden on the University of Washington and Dr. Matsen in responding to discovery requests regarding proprietary, confidential, ongoing, and incomplete academic research regarding matters that Dr. Matsen has not considered in formulating his opinions proffered in these cases is unnecessary, and unjust, and Dr. Matsen and the University of Washington should be protected from that burden. Ibid., at paragraphs 7, 16.

In support of plaintiffs' Response, plaintiffs rely upon the Declaration Of Frederick A. Matsen, III, M.D. Regarding Stryker's Subpoena Dated July 23, 2009, dated

August 25, 2009, and the exhibits thereto, which are being filed herein. Plaintiffs also rely upon the Plaintiffs' Opposition To Motion To Compel, And In Support Of Plaintiffs' Motion To Quash Stryker's Subpoenas dated August 11, 2009, previously filed in these cases.

CONCLUSION

Since Dr. Matsen is producing the underlying data considered by him in formulating his opinions proffered in these cases, and Judge Aiken has ruled on the issue, defendant Stryker's emergency motion should be denied as moot.

Dated this 2nd day of September, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT STRYKER CORPORATION'S REQUEST FOR EMERGENCY REVIEW OF OBJECTIONS TO SUBPOENA FOR EXPERT MATERIALS PRIOR TO DEPOSITION was served upon the following named person(s):

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on the date indicated below, by electronic filing notification and/or e-mail.

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